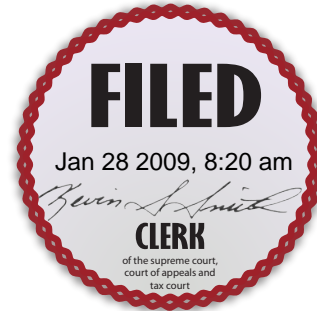


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**IN THE
COURT OF APPEALS OF INDIANA**

SIDNEY TOLBERT,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0803-CR-270
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Magistrate
Cause Nos. 49G22-0712-FC-263016 and
49G22-0709-FD-185963

January 28, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Following a bench trial, Sidney Tolbert appeals his convictions for robbery as a class C felony, two counts of class D felony possession of a controlled substance, and public intoxication as a class B misdemeanor.

We affirm in part and reverse in part.

ISSUES

1. Whether sufficient evidence was presented to support Tolbert's convictions for robbery and public intoxication.
2. Whether the trial court properly admitted evidence obtained from the search incident to Tolbert's arrest for public intoxication.

FACTS

On September 7, 2007, at approximately 10:50 p.m., Officer Michael Bragg of the Indianapolis Metropolitan Police Department ("IMPD") observed Tolbert lying on his back on the front porch of the residence located at 1038 North Rural Street. Officer Bragg exited his patrol vehicle and approached the residence to check on Tolbert's welfare. In the front yard, he saw a "For Sale" sign. The grass in the front yard looked like it "hadn't been mowed in ages," and "[t]here was trash thrown through the yard." (Tr. 47). As he neared the residence, Officer Bragg was able to look inside the home and noted that it was vacant.

Officer Bragg walked up onto the porch and stood over Tolbert, who appeared to be asleep. He bent over and tried to wake up Tolbert. While kneeling over Tolbert, Officer Bragg "smelled a strong odor of alcoholic beverage." (Tr. 48). After three or four minutes, Officer Bragg was able to awaken Tolbert. Once awake, Tolbert's speech

was mumbled such that Officer Bragg could not understand him. Tolbert was also unable to stand on his own. At that point, Officer Bragg arrested Tolbert for public intoxication. During a search incident to the arrest, Officer Bragg found what was later determined to be five codeine pills and one hydrocodone tablet in Tolbert's right front pants pocket. On September 11, 2007, the State charged Tolbert with two counts of class D felony possession of a controlled substance and one count of public intoxication as a class B misdemeanor.

On December 9, 2007, Officer Scott Emminger of the IMPD was traveling westbound on East Washington Street. In the parking lot of a Speedway gas station located at the intersection of Washington and State Streets, Officer Emminger saw two men "with aggressive posture standing in close proximity to one another. It looked like two guys about ready to fight." (Tr. 22). The two men were Tolbert and Richard Byrd. Byrd was holding a black backpack that he stated contained clothes, alcohol, and less than one hundred dollars in cash. Tolbert testified that he told Byrd that he wanted the backpack. When Byrd refused to give him the backpack, Tolbert punched Byrd in the jaw. Tolbert then took the backpack and began to walk away from the gas station. Officer Emminger testified that he did not see Byrd hit Tolbert. Officer Emminger then activated his emergency lights and siren. Noticing this, Tolbert dropped the backpack and ran away from the scene.

Officer Emminger ultimately caught up with Tolbert and arrested him. At that time, Officer Emminger noticed that Tolbert's speech was slurred, his eyes were glassy, and there was a strong odor of alcohol about him. The State charged Tolbert with

robbery as a class C felony, theft as a class D felony, resisting law enforcement as a class A misdemeanor, battery as a class A misdemeanor, and public intoxication as a class B misdemeanor.

On February 6, 2008, the trial court conducted separate bench trials for Tolbert's September 7, 2007 and December 9, 2007 offenses. Prior to trial, Tolbert filed a motion to suppress evidence of the drugs found during the search incident to his September 7, 2007 arrest for public intoxication. In the motion, Tolbert argued that the search violated the Fourth Amendment to the United States Constitution because the police "did not have probable cause to believe [Tolbert] committed the crime of public intoxication as he was on private property." (App. 24). At the time the trial on Tolbert's September 7, 2007 offenses commenced, the trial court had not yet ruled on the motion to suppress. When the State sought to introduce evidence of the drugs, Tolbert's counsel objected. The trial court overruled the objection, and the drugs were admitted into evidence. At the conclusion of the trial, the trial court found Tolbert guilty of two counts of class D felony possession of a controlled substance and one count of class B misdemeanor public intoxication.

During the trial on Tolbert's December 9, 2007 offenses, Tolbert testified that he was trying to buy a bottle of alcohol from Byrd for ten dollars. Tolbert stated that he gave Byrd a twenty-dollar bill for the alcohol. Byrd, though, refused to give Tolbert the bottle of alcohol and kept the twenty-dollar bill. Tolbert related that Byrd then tried to strike him but missed. At that point, Tolbert punched Byrd. Tolbert then stated that he walked away from the fight and that he never took Byrd's backpack. Despite Tolbert's

testimony, the trial court found him guilty of robbery as a class C felony, theft as a class D felony, resisting law enforcement as a class A misdemeanor, battery as a class A misdemeanor, and public intoxication as a class B misdemeanor.

On February 20, 2008, the trial court conducted a sentencing hearing. With regard to Tolbert's September 7, 2007 offenses, the trial court sentenced Tolbert to one hundred and eighty days for both of his possession of a controlled substance convictions and for his public intoxication conviction. Each of these sentences was to be served concurrently. As to Tolbert's December 9, 2007 offenses, the trial court merged the theft and battery convictions with the robbery conviction. The court sentenced Tolbert to four years with 1,275 days suspended for the robbery conviction, one year for resisting law enforcement, and one hundred and eighty days for public intoxication. These sentences were to be served concurrently with each other but consecutively with the sentences for the September 7, 2007 offenses. Tolbert's cases were consolidated for this appeal, and this appeal ensued.

DECISION

1. Sufficiency of the Evidence

Tolbert first argues that the State did not present sufficient evidence to support his convictions for robbery and public intoxication. In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or judge the credibility of the witnesses. *Vitek v. State*, 750 N.E.2d 346, 352 (Ind. 2001). We will only consider the evidence most favorable to the verdict and any reasonable inferences drawn therefrom. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable trier of fact

could have found the Defendant guilty beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

A. Robbery

To convict Tolbert of robbery as a class C felony, the State had to show that Tolbert knowingly or intentionally took property from another person by using or threatening the use of force. Ind. Code § 35-42-5-1. Tolbert contends that through his testimony at trial, he raised a claim of self-defense. He asserts that the State failed to rebut his claim of self-defense and, therefore, his conviction for robbery should be reversed.

We review a challenge to the sufficiency of the evidence to rebut a claim of self-defense using the same standard as for any claim of insufficient evidence. *Pinkston v. State*, 821 N.E.2d 830, 841 (Ind. Ct. App. 2004), *trans. denied*. “A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force.” Ind. Code § 35-41-3-2(a). In order to establish a claim of self-defense, a defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. *Pinkston*, 821 N.E.2d at 842. When a claim of self-defense is raised and is supported by evidence, the State has the burden of negating at least one of the necessary

elements. *Id.* “The State may satisfy its burden by either rebutting the defense directly or relying on the sufficiency of evidence in its case-in-chief.” *Id.*

Tolbert testified that on December 9, 2007, he gave Byrd twenty dollars as payment for a ten-dollar bottle of alcohol. He alleged that Byrd refused to give him the alcohol and kept the twenty dollars. Tolbert testified that Byrd then tried to punch him but missed. In response, Tolbert stated that he punched Byrd.

Assuming without deciding that Tolbert’s testimony was sufficient to raise a claim of self-defense, the State presented sufficient evidence to rebut this defense. Officer Emminger testified that he saw Tolbert and Byrd standing in close proximity to one another with aggressive posture. He stated, “It looked like two guys about ready to fight.” (Tr. 22). Officer Emminger then saw Tolbert punch Byrd on the jaw. At no time did Officer Emminger see Byrd attempt to hit Tolbert. This evidence negates one of the necessary elements of Tolbert’s self-defense claim as it indicates that Tolbert provoked, instigated, and willingly participated in the violence.

The State presented sufficient evidence to support Tolbert’s robbery conviction. When he arrived on the scene, Officer Emminger testified that Byrd was holding a black backpack. Byrd testified that the backpack contained his clothing, alcohol, and some cash. Tolbert told Byrd that he wanted the backpack. When Byrd refused to give him the backpack, Tolbert punched Byrd on the jaw and took the backpack. Therefore, we affirm Tolbert’s conviction for robbery.

B. Public Intoxication

Indiana Code section 7.1-5-1-3 provides, “It is a Class B misdemeanor for a person to be in a public place . . . in a state of intoxication” Tolbert argues that the State did not present sufficient evidence to prove that he was in a public place at the time Officer Bragg arrested him for public intoxication.

“The term ‘public place’ is not defined by the public intoxication statute.” *Wright v. State*, 772 N.E.2d 449, 454 (Ind. Ct. App. 2002). Over the years, however, the courts of this state have offered definitions of this term. In *State v. Tincher*, 21 Ind. App. 142, 51 N.E. 943, 944 (1898), we stated, “A ‘public place’ does not mean a place devoted solely to the use of the public; but it means a place which is in point of fact public, as distinguished from private,—a place that is visited by many persons, and usually accessible to the neighboring public.” “More recently, the definition has been reiterated as a place ‘visited by many persons, and usually accessible to the neighboring public.’” *Wright*, 772 N.E.2d at 455 (quoting *Martin v. State*, 499 N.E.2d 273, 276 (Ind. Ct. App. 1986)). “We have also deemed the term to include a place open to common and general use, participation and enjoyment; a place accessible to the public.” *Id.*

It is well established in this state that a private residence, including the grounds surrounding it, is not a public place. *Moore v. State*, 634 N.E.2d 825, 827 (Ind. Ct. App. 1994). Here, Officer Bragg arrested Tolbert at 1038 North Rural Street, a private residence. As such, the State did not present sufficient evidence that Tolbert was intoxicated at a public place.

The State, however, notes that, in certain instances, private property may qualify as a public place. *See State v. Culp*, 433 N.E.2d 823, 825 (Ind. Ct. App. 1982), *trans. denied*. The State argues as follows:

Here, the residence where Officer Bragg found Tolbert unconscious had been rendered a public place. Because the home was easily observable to be vacant, tall grass grew around it, and its yard was strewn with trash, it would have been readily apparent to anyone wishing to enter upon the property that the owner was not present to prevent it. Thus, by virtue of its quasi-abandonment, the residence had become, *de facto*, a place that was accessible to the general public. In addition, a sign advertising the residence's availability for sale was visible in the yard. The sign amounted to an implied invitation to make the residence available to those who might wish to view or purchase it, and thus rendered what would normally be a purely private space into a public one.

State's Br. 7 (citations omitted).

We disagree with the State's assertion that a vacant residence is a public place simply by virtue of it being vacant. In *Jones v. State*, 881 N.E.2d 1095 (Ind. Ct. App. 2008), police found Jones intoxicated sitting in a car parked in the driveway of a vacant residence. Jones was convicted of public intoxication. On appeal, Jones argued that there was insufficient evidence that she was intoxicated in a public place. Although the residence located on the property where Jones was arrested was vacant, we noted that the vehicle Jones was sitting in was "parked on private property." *Id.* at 1098. Based on this, we concluded that there was "insufficient evidence Jones was intoxicated in a public place and reverse[d] her conviction for public intoxication." *Id.* *Jones* indicates that although a residence may be vacant, absent some further evidence that the residence has become a public place, it remains private property.

Here, besides noting that the residence was vacant, the State did not introduce any further evidence that would suggest 1038 North Rural Street had become a public place. Officer Bragg testified that the grass in the front yard was unmown and was littered with trash. Many private residences, though, have unmown front yards that contain trash, and yet these residences are not considered public places. These facts alone do not indicate 1038 North Rural Street was a public place.

In this case, little information was given to the trial court about 1038 North Rural Street. Officer Bragg did not know who owned the property. For all he knew, Tolbert might have been the owner of the property. There was no evidence presented as to whether the owner of the property permitted Tolbert to enter onto the property. Officer Bragg testified that the property was vacant, but there was no indication as to how long the residence had been vacant or if in fact the owner had abandoned the residence. No evidence was presented as to whether individuals in the neighborhood regularly congregated at 1038 North Rural Street or whether people in the area believed the residence was abandoned. Such evidence would have been relevant in assessing whether the property had become a public place.

We also disagree with the State's contention that a private residence becomes a public place because it has been placed for sale. When property is placed for sale, a limited invitation to enter onto the property is extended to potential purchasers. The property, though, is not open to common and general use by the public. Generally, potential purchasers are only invited onto the property when the seller or realtor is present. The invitation is usually only extended during regular business or daylight

hours. Such an invitation would not likely extend, as in this case, to 10:50 at night. Had Tolbert come to the property as a potential purchaser, met with the owners or a realtor, and been intoxicated, it is possible that the property could have been considered a public place. However, that is not what occurred in this case. There is no indication that Tolbert came to 1038 North Rural Street on the night of September 7, 2007 as a potential purchaser of the property. The mere fact that the property was for sale does not, alone, make it a public place.

Additionally, we note that “[t]he spirit of the public intoxication statute is to prevent people from becoming inebriated and then bothering and/or threatening the safety of other people in public places.” *Wright*, 772 N.E.2d at 456. Our supreme court has stated, “The purpose of the law is to protect the public from the annoyances and deleterious effects which may and do occur because of the presence of persons who are in an intoxicated condition.” *State v. Sevier*, 117 Ind. 338, 340, 20 N.E. 245, 246-47 (1889). Prosecuting and convicting Tolbert for being intoxicated while he slept on the front porch of a private residence, not disturbing or offending anyone, does little to further the purpose of the public intoxication statute.

Therefore, we conclude that the State did not carry its burden of showing that 1038 North Rural Street was a public place. As such, the State failed to present sufficient evidence to show that Tolbert was intoxicated in a public place. Thus, Tolbert’s conviction for public intoxication is reversed.

2. Admission of Evidence

Tolbert argues that the trial court erred in admitting the drug evidence obtained from the search incident to his arrest for public intoxication. We agree.

This case comes to us following a bench trial and conviction, not as an interlocutory appeal from the trial court's denial of Tolbert's motion to suppress. "Therefore, the issue on appeal is whether the trial court erred in admitting the evidence obtained during the allegedly illegal search." *Ware v. State*, 859 N.E.2d 708, 715 (Ind. Ct. App. 2007), *trans. denied*. "We will reverse the trial court's ruling only when it has abused its discretion in admitting the evidence. A trial court abuses its discretion if its decision is clearly contrary to the facts and circumstances before it." *Id.* (citations omitted).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Warrantless searches and seizures are per se unreasonable unless an exception to the warrant requirement applies. *VanPelt v. State*, 760 N.E.2d 218, 221 (Ind. Ct. App. 2001), *trans. denied*. "The State bears the burden of proving that a warrantless search falls within one of the narrow exceptions to the warrant requirement." *Id.* One exception to the warrant requirement is a search incident to arrest. *Id.* at 222. "In order for a search incident to arrest to be valid, the arrest itself must be lawful. Probable cause must be present to support the arrest." *Id.* (citations omitted).

Here, Officer Bragg arrested Tolbert for public intoxication. Incident to that arrest, Officer Bragg searched Tolbert's person and found five codeine pills and one hydrocodone tablet. We have already determined that Officer Bragg did not have probable cause to arrest Tolbert for public intoxication because Tolbert was not

intoxicated in a public place. Because Tolbert's arrest for public intoxication was not lawful, Officer Bragg's warrantless search of Tolbert's person violated the Fourth Amendment. As such, the trial court should have suppressed the drug evidence obtained from Officer Bragg's search. The trial court's failure to do so constituted an abuse of discretion. Without this evidence, the State did not present sufficient evidence to support Tolbert's convictions for possession of a controlled substance. *See* I.C. § 35-48-4-7(a) (providing that in order to be found guilty of possession of a controlled substance, an individual must knowingly or intentionally possess a controlled substance). Therefore, Tolbert's convictions for possession of a controlled substance are reversed.

Affirmed in part and reversed in part.

FRIEDLANDER, J., concurs.

BARNES, J., concurs in result in part and dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

SIDNEY TOLBERT,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0803-CR-270
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

BARNES, Judge, concurring in result in part and dissenting in part

I fully concur in the reversal of Tolbert’s public intoxication conviction for insufficient evidence. I concur in result only as to the affirmance of his robbery conviction, and dissent as to the reversal of his convictions for possession of a controlled substance.

As to the robbery conviction, Tolbert argues that his claim of self-defense requires reversal. The majority assesses this argument on the merits, ultimately concluding that there was sufficient evidence to rebut this defense. The State argued in its brief, “At a more fundamental level, Tolbert’s self-defense claim to the robbery is unavailing because self-defense cannot be asserted as to that offense.” Appellee’s Br. p. 9. I agree, and do

not want to give the impression that there might be a situation in which a defendant, with “better” evidence, could claim self-defense in a robbery trial.

Indiana Code Section 35-41-3-2(f)(1) states, “a person is not justified in using force if the person . . . is committing, or is escaping after the commission of, a crime” Our supreme court has held that if there is sufficient evidence a defendant has committed robbery, i.e. by taking the property of another by force or threat of force, a claim of self-defense cannot be applied as a defense to that crime. Debose v. State, 450 N.E.2d 71, 72 (Ind. 1983). In other words, if Tolbert in this case simply had punched Byrd and only was charged with battery, he might have been able to claim self-defense. But Tolbert also took Byrd’s backpack; even if Byrd had tried to punch Tolbert, as Tolbert claimed, under no circumstances could that have justified Tolbert’s taking of Byrd’s backpack. It is on this basis alone that I would affirm Tolbert’s robbery conviction and reject his self-defense claim.

Turning to Tolbert’s controlled substance convictions, the majority reverses them on the basis that Officer’s Bragg’s discovery of the codeine and hydrocodone pills on Tolbert’s person was the result of an illegal search, because Tolbert’s arrest for public intoxication that led to that search itself was illegal. I reiterate that I agree with the majority that the evidence presented (or not presented by the State) at trial was insufficient to support the conclusion that 1038 North Rural Street was a “public” place so as to support Tolbert’s public intoxication conviction. However, I believe the majority errs when it later says, “We have already determined that Officer Bragg did not have

probable cause to arrest Tolbert for public intoxication” Slip op. p. 12. The sufficiency of the evidence analysis did not answer this question.

The issue of whether Officer Bragg had probable cause to arrest Tolbert is different from whether there was sufficient evidence to convict him. The Supreme Court has explained the difference between probable cause and proof beyond a reasonable doubt as follows:

As early as Locke v. United States, 7 Cranch 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context: “[T]he term “probable cause,” according to its usual acceptance, means less than evidence which would justify condemnation It imports a seizure made under circumstances which warrant suspicion.’ More recently, we said that ‘the quanta . . . of proof’ appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. [Brinegar v. United States, 338 U.S. 160, 173, 69 S. Ct. 1302, 1309 (1949).] Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision.

Illinois v. Gates, 462 U.S. 213, 235, 103 S. Ct. 2317, 2330 (1983). To determine whether an officer had probable cause to arrest an individual, a court examines the events leading up to the arrest, and then decides whether those facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Maryland v. Pringle, 540 U.S. 366, 371, 124 S. Ct. 795, 800 (2003).

Here, when Officer Bragg came upon Tolbert passed out on the porch of 1038 North Rural Street, the property appeared to be vacant, but not completely abandoned, as evidenced by the “For Sale” sign in the yard. Tolbert, being highly intoxicated and unresponsive, obviously could not have told Officer Bragg whether he was permitted to be on the property. Under the circumstances, I do not believe Officer Bragg was required

to refrain from arresting Tolbert for public intoxication unless he first conducted a thorough investigation into the status of the property and Tolbert's presence there. In sum, I conclude Officer Bragg had probable cause to arrest Tolbert at that time, notwithstanding the State's failure to further develop its case at trial. As such, the pills Officer Bragg found on Tolbert were the result of a proper search incident to arrest. I vote to affirm Tolbert's convictions for possession of a controlled substance.